STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

BARBARA CORNELIUS and
GERALD CORNELIUS,

Plaintiffs/Appellees,

vs.

K.M. JOSEPH, M.D., BLUE WATER VASCULAR CLINIC, and ST. JOHN HEALTH SYSTEM,

Defendants/Appellants.

Supreme Court No. 123765
COA#: 237956
Lower Ct. #. 99-002403-NH

Hon. Daniel J. Kelly

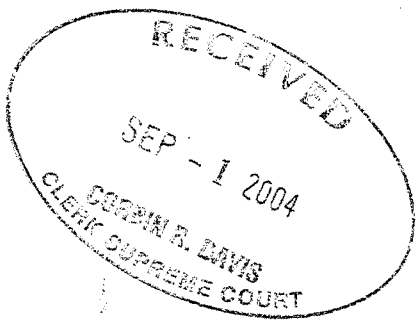
DARLENE B. GRICIUS (P42385)
Attorney for Plaintiffs/Appellees
6250 Orchard Lake Road, Suite 294
West Bloomfield, MI 48322
(248) 855-4882

MERIA E. LARSON (P30582)
FRANK J. LAGROU (P48877)
BLAKE, KIRCHNER, SYMONDS,
LARSON, KENNEDY & SMITH, P.C.
Attorneys for Defendants/Appellants
1432 Buhl Building, 535 Griswold
Detroit, MI 48226
(313) 961-7321

PLAINTIFFS/APPELLEES' BRIEF ON APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED



Submitted By:

DARLENE B. GRICIUS (P42385)
Attorney for Plaintiffs/Appellees
6230 Orchard Lake Road, Suite 294
West Bloomfield, MI 48322
(248)855-4882

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statutes

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY RECOGNIZED THE COROLLARY DOCTRINE OF INFORMED CONSENT IN DECIDING PLAINTIFFS' CLAIM OF MEDICAL MALPRACTICE?

Plaintiffs/Appellees answer "Yes".
Court of Appeals answers "Yes"

II. WHETHER THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S RULING THAT PLAINTIFFS' INFORMED CONSENT CLAIM BASED ON THE MARCH 13, 1997, TREATMENT WAS TIME-BARRED?

Plaintiffs/Appellees answer "Yes".
Court of Appeals answers "Yes"

JURISDICTIONAL STATEMENT

Plaintiffs/Appellees state that the jurisdictional summary set forth in Defendants/Appellants' brief is complete and correct.

STANDARD OF REVIEW

Plaintiffs/Appellees state that the standard of review set forth in Defendants/Appellants' brief is complete and correct.

COUNTER-STATEMENT OF FACTS

Treatment

Plaintiff Barbara Cornelius first saw Defendant Dr. Khattab Joseph, a vascular surgeon, in April 1996, for complaints of bilateral foot pain. According to the deposition testimony of Defendant Dr. Joseph, Mrs. Cornelius did not have varicose veins of the legs at that time. Dr. Joseph testified that when Mrs. Cornelius returned in October 1996, she did have varicose veins of the legs. When asked if it is unusual to get varicose veins in such a short period of time, Dr. Joseph stated that "it is unusual to get it six months later."

> "Q. Did you notice anything different in the severity of her varicose veins in October to the previous April?
> A. In April I don't mention -- as far as I recall, I didn't mention much about varicose veins.
> Q. In April 1996 you don't have any indication that she was suffering from varicose veins at that time?
> A. Maybe she had and they were not significant clinically, Maybe she did. I cannot -- I cannot –.
> Q. Would that have been important to include in the medical records, your office records?
> A. No. They were not important. I told you, I only mention the things which I'm going to -- is going to -- I'm going to do something and the correct something was not done or something I have to add.
> If I'm a family physician, I mention everything because I get paid what I do".
>
> * * * * * * * * * * * * * * * *
>
> "Q. Would you find it unusual that in October of '96 that she would be then suffering from varicose veins?
> A. What's the question?
> Q. Well, you said in April of '96 you don't have any indication of the varicose veins condition, but in October of '96, which is approximately six months later, she does have varicose veins. Is that unusual that in such a short period of time the varicose veins have been important?
> A. I don't know. I don't know. I don't know how to answer that question. I don't know whether she had them - - if she had them before and they were not significant. I didn't mention them".
> (Appendix pages 171a-173a)

Mrs. Cornelius returned to Dr. Joseph's office on October 26, 1996, for complaints of pain and swelling of her feet. Defendants attached to their Motion For Summary Disposition, as Exhibit B, a form letter, dated October 26, 1996, addressed to "none" which indicates that Plaintiff has "a history of large symptomatic varicose veins". (Appendix page 29a) **This form letter is completely contrary to Defendant's own deposition testimony which indicates that Plaintiff did <u>not</u> have a history of varicose veins.**(Appendix page 174a)

In October 1996, Defendant Dr. Joseph commenced sclerotherapy treatments on Plaintiff. At her deposition, Mrs. Cornelius testified that **<u>at the office visit in the middle of March 1997</u>**, Defendant put the needle in her leg, pulled it out and then he moved to another location, just next to where he attempted to inject the solution. At about the fourth attempt, Defendant injected the solution into Plaintiff's leg. At that same visit, Defendant did the same on Plaintiff's ankle, poking the needle in and out several times, and eventually injecting the solution into the ankle area.

> "Q. You indicated that the doctor had difficulty locating a vein but ---- he injected solution on the fourth attempt, is that correct?
> A. Yes.
> Q. Then what happened?
> A. Then he did the same on an ankle, on my left ankle, he poked the needle in and out several times, and the girl commented the same comment. And he said, no, I can find it. And then he injected it."

(Appendix pages 175a-178a)

Defendant Dr. Joseph does not know where he injected Plaintiff's leg during the treatment performed on March 13, 1997, does not know which leg he injected, nor does he know if he also injected Plaintiff's feet. Defendant Dr. Joseph does not record the injection sites, and in essence relies upon the patient to tell him where injections have been made:

"Veins are veins. It doesn't matter where they are."

* * * * * * * * * * * * * * * * *

Q. So how would you know if you don't keep a record of which veins you're injecting?
A. I will know next time if they didn't disappear.
We'll go by area, not be – and patient knows.

* * * * * * * * * ** * * * * * **

Q. But they could still be there because the treatment didn't work?
A. That's correct. And some of them they need to be injected more than once."
(Appendix pages 179a-181a)

Furthermore, it should be noted that Defendant Dr. Joseph cannot recall if Plaintiff had spider veins, and does not know how many varicose veins were remaining at the visit of March 13, 1997. (Appendix pages 182a-185a)

Immediately after the injection of March 13, 1997, the injection site of Plaintiff's leg began to burn and became very red. Three days later, her leg continued to burn and she could observe fluid under the skin. Plaintiff therefore suffered an **"ulceration", not infection,** of the leg as a result of the injection administered by Dr. Joseph on March 13, 1997. (Appendix pages 42a, 175a--181a)

The ulceration persisted and on April 14, 1997, Mrs. Cornelius was seen by Dr. Pelachyk, a dermatologist. The office records of Dr. Pelachyk for said visit, indicate that Mrs. Cornelius was there on an urgent basis for evaluation and treatment of a persistent **"ulceration"** of her right upper calf, which developed following sclerotherapy for superficial venous varicosities. Dr. Pelachyk's records further indicate that Mrs. Cornelius recently had sclerotherapy for her varicosities performed by Dr. Joseph and at the site in question on the right upper calf, she experienced pain, burning, and blister formation following the intravascular injection of presumed hypertonic saline. (Appendix page 263a) Treatment rendered by Dr.

Pelachyk included debridement of a portion of the thick yellowish adherent membrane overlying the **ulcer** on the right upper calf. Mrs. Cornelius was thereafter referred to a plastic surgeon, Dr. Smit. At the initial consultation of May 22, 1997, Dr. Smit's office records indicate that the patient presents with an **ulceration** as a result of an area where she has sclerotherapy. Dr. Smit suggested treating conservatively and to see her again in two weeks with the possibility of excision and closing. Mrs. Cornelius returned to Dr. Smit's office on June 5, 1997, June 13, 1997, and on July 29, 1997. She was then advised to return in four months. At that visit four months later, Dr. Smit's records indicate "**significant induration deep in the area**". Dr. Smit did not believe that it would be appropriate to do anything at that point, and advised Mrs. Cornelius to return in eight months.

The office records of Dr. Smit of August 24, 1998, state that Mrs. Cornelius "wishes to go ahead with excision of this area. She understands that a longer scar will be present. She also understands that no guarantee can be given that this will be improved with certainty but in all likelihood that it will. She understands that the scar will be significantly longer than her present scar. The scar is painful." (Appendix page 268a)

On September 14, 1998, over a year and a half after the injection administered by Dr. Joseph on March 13, 1997, and when the ulcer had healed sufficiently, excision and reclosure of the wound was performed by Dr. Smit at Mercy Hospital. (Appendix page 229a)

It should be observed that the office chart of Defendants produced at the deposition of Defendant Dr. Joseph contained an altered entry. Specifically, the entry for December 30, 1996, as produced at the deposition of Dr. Joseph on April 5, 2001, (Appendix page194a), has been altered. The entry for December 30, 1996, as produced in February 1998, prior to litigation,

(Appendix page 195a), does not contain the reference to "bottom of foot". (Appendix pages 196a-199a)

Plaintiffs' expert witness, Dr. Heiskell testified that Defendant Dr. Joseph's office records are incomplete and very poor.

> "A. -- I mean, his records are pretty poor. He doesn't mention where he injected. He says, "Injections done." He doesn't mention which leg, what part of the leg, or how many veins were injected.
> I mean, his records are very incomplete",
> (Appendix page 201a)

Defendant Dr. Joseph does not know where he injected Plaintiff's leg during the treatment performed on March 13, 1997, and does not know which leg he injected. (Appendix pages 179a-181a)

Furthermore, Defendant Dr. Joseph cannot recall if Plaintiff had spider veins, and does not know how many varicose veins were remaining at the visit of March 13, 1997. (Appendix pages 181a-185a) As Dr. Heiskell testified, even the diagnosis rendered by Dr. Joseph is not clear:

> "Q. Did you disagree with Dr. Joseph's diagnosis for this patient, or just his, I guess, treatment course and . . .
> A. What is his diagnosis?
> Q. As far as from the from the records, you don't know?
> A. What is his diagnosis from the records? If you look at the vascular lab report under "Signs and Symptoms, it say "VV", which I presume means varicose veins. On his office records, he doesn't say anything about a diagnosis. There are the first two or three office visits, and then he says, " Bilateral varicose veins and absent pedal pulses." So you know, I don't know what his diagnosis is."
> (Appendix pages 202a-203a)

According to Dr. Joseph, the form letter he sends to the insurance company is his

"office chart" for the patient. (Appendix pages 204a-206a)

Plaintiff's expert witness testified that he could not testify either way as to whether Dr. Joseph was negligent in administering the injection that caused the ulceration. According to Dr. Heiskell, he had no evidence that Dr. Joseph had inappropriate technique in performing the injection, **nor did Plaintiffs' expert have evidence that Dr. Joseph's technique was appropriate.**

> "A. With his technique, I have no evidence that he had inappropriate technique in performing the injections.
>
> - - - - - - - - - - - - - - - - - - -
>
> A: I said that I am saying that I see no evidence of inappropriate technique. In other words, I think his technique-- in the best of hands, using the proper technique, these ulcerations happen to whoever is doing them.
> Q. But conversely, you don't have any evidence that says it was appropriately done either?
> A That's correct.
> Q. So you can't say either way; is that what you're saying?
> A. That's correct".
> (Appendix page 43a)

Informed Consent

In reference to the alleged "consent form" (Appendix page 190a) it should be observed that office records received from Defendants in February 1998, prior to litigation, did not contain said "consent form." Furthermore, Plaintiff's expert, Dr. Andrew Heiskell, testified at his deposition, that when Defendant's records regarding Plaintiff were sent to him for his review, no consent form signed by Plaintiff was contained in said records.

> "Q. And in looking at your Affidavit of Merit, it indicates that in order to comply with the standard of care, my defendant, my client, had the responsibility
>
> of forming or alerting the plaintiff of the risks and
> Q. And are you aware of Mrs. Cornelius signing

any form of-- any consent form?
A. When I reviewed the chart originally, there was no consent form apparent in the chart. I have learned recently that, apparently, there is a consent form, which I have not seen."
(Appendix page 186a)

Dr. Heiskell further testified,

"A. You've thrown me a little bit off base here, because you showed me this document, which is the consent that I haven't seen before."
(Appendix page 41a)

It is also interesting to observe that this form was not produced at the time of Plaintiff's deposition. During her deposition, in February 2000, Plaintiff testified that the risks and complications associated with sclerotherapy were never explained to her by Defendant Dr. Joseph nor anyone from his office. (Appendix page 187a) Mrs. Cornelius reviewed the alleged "consent form" and as her affidavit states, she **never** signed this form. (Appendix page 188a)

At his deposition, Plaintiffs' expert witness testified that the standard of care requires the surgeon to obtain an informed consent prior to commencing sclerotherapy.

"Q. In this case, does the standard of care for a surgeon, such as Dr. Joseph, require him to obtain an informed consent from the patient prior to commencing the sclerotherapy treatment?
A. As I understand the question, yes. It is the standard of care to get informed consent to begin sclerotherapy; yes.
Q. Right.
and if the-- if the-- so if the doctor starts the treatment without that informed consent, that would be a breach of the standard of care?
A. That's correct."
(Appendix page 191a)

Dr, Heiskell further testified that the patient should be informed of the risk of ulceration prior to commencing sclerotherapy, and should also be informed of the recurrence

of varicose veins following said treatment:

"Q. Also, as to the informed consent, should there have been a discussion as to ulceration?

- - - - - - - - - -

A. Yes.
Q. Why is that?
A. I think, generally, in discussing this procedure with patients, that that's an important thing that has to be mentioned.
Q. Is there any indication in the records or in this proposed informed consent form that's been provided that the defendant discussed the possibility and risks of ulceration?
A. There's nothing in there that specifically states that; no.

* * * * * * * * * * * * * * * * * * *

Q. In reference to the informed consent, do you have an opinion as to whether the recurrence or the appearance of those veins, is that something that should have been discussed with the plaintiff prior to treatment?
A. Yes, I think that's important.

* * * * * * * * * * * *

Q. So that should have definitely been included in the informed consent?

* * *** ** * * * * ** * * ****

A. Yes".
(Appendix pages 192a-193a)

Dr. Heiskell never testified that if informed consent is <u>not</u> obtained at the initial treatment, informed consent need not be obtained at each subsequent treatment. Note that Dr. Heiskell's testimony as to each treatment was premised on the fact that initial informed consent had been obtained. Even with initial informed consent being obtained, Dr. Heiskell testified that it is better to obtain informed consent at each treatment indicating that there are certain things we do are the same treatment but are "prolonged". (Appendix page 40a)

In Mrs. Cornelius' case, it is unknown if the injection site of the ulceration had been previously injected and this involved additional treatments to the same area. As indicated above,

Defendant Dr. Joseph does not know where he injected Plaintiff's leg during the treatment performed on March 13, 1997, does not know which leg he injected, nor does he know if he also injected Plaintiff's feet. Defendant Dr. Joseph does not record the injection sites. (Appendix pages 179a-181a)

Consequently, Dr. Heiskell in reviewing the records of Dr. Joseph was unable to determine if the site of the ulceration which occurred on March 13, 1997, had been previously injected. As Dr. Heiskell testified, Dr. Joseph "doesn't mention which leg, what part of the leg, or how many veins were injected. I mean, his records are very incomplete",
(Appendix page 201a)

Procedural History

Defendants filed their Motion For Summary Disposition claiming that Plaintiffs utilized the "last treatment rule" in determining the accrual date of this cause of action. In support of their Motion, Defendants relied upon the Court of Appeals' decision in McKiney v Clayman, 237 Mich App 198 (1999) alleging that Plaintiffs' cause of action accrued when the diagnosis was made and the sclerotherapy treatment was commenced on October 28, 1996.

Plaintiffs' filed their Response arguing that their claim accrued on March 13, 1997, the date of the injury to Plaintiff's leg. At the hearing of Defendants' motion, this Honorable Court advised that it had never received Plaintiffs' response. Subsequent to said hearing, Plaintiffs' counsel was advised by the Court that Plaintiffs' response was received by the Court but had been misplaced. A copy of Plaintiffs' response was resubmitted to the trial court. Thereafter, Defendants' Motion For Summary Disposition was granted.
Plaintiffs then submitted their Motion For Rehearing or Reconsideration pursuant to MCR 2.119 (F), arguing that the trial court was mislead in granting Defendants' Motion For Summary

Disposition in that Plaintiffs' never utilized the "last treatment rule" in determining the accrual date of their claim. Specifically, Plaintiffs argued that Defendants mistakenly interpreted the holding in McKiney as setting forth a "first treatment rule", and noted that the Court of Appeals in McKiney never directed that the accrual date for determining when the statute of limitations begins to run is the date when the diagnosis is made and the course of treatment is begun. Plaintiffs further argued that the injury (ulceration), as required pursuant MCL 600.2912a, occurred on March 13, 1997, not October 28, 1996. The trial court denied Plaintiffs' Motion.

On appeal, in reversing the trial court, the Court of Appeals held that the failure to obtain a patient's informed consent before the initial treatment did not eliminate the need for obtaining the patient's informed consent before subsequent treatments. Therefore, if Defendant Joseph never obtained plaintiff Barbara Cornelius' informed consent, a separate accrual date would result from each treatment undertaken. (Appendix page 133)

ARGUMENTS IN OPPOSITION

I. IN A MEDICAL MALPRACTICE CASE, THE PLAINTIFF BEARS THE BURDEN OF PROVING ALL OF THE FOLLOWING (1) APPLICABLE STANDARD OF CARE, (2) BREACH OF THAT STANDARD OF CARE BY DEFENDANT, (3) INJURY, AND (4) PROXIMATE CAUSATION BETWEEN THE ALLEGED BREACH AND THE INJURY.

Under Michigan statutory law, specifically MCL 600.2912a, proof of a medical malpractice claim requires proof of an injury:

> **600.2912a. Action alleging malpractice; burden of proof.**
>
> **Sec. 2912a. (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:**
>
> **(a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.**
>
> **(b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.**
>
> **(2) In an action alleging medial malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.**

Likewise, Michigan courts have held that a Plaintiff in a medical malpractice cause of action has the burden of proving (1) the applicable standard of care; (2) breach of that standard of care by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury. Wischmeyer v Schanz, 449 Mich 469; 536 NW2d 760 (1995). Clearly, under both Michigan statutory and case law, in order to pursue a medical malpractice action, an injury

which is the basis of the plaintiff's claim, must be proven. In the instant matter, the ulceration to Mrs. Cornelius' leg which occurred on March 13, 1997, is the injury which is the basis of plaintiff's claim.

II. INFORMED CONSENT IS A DUTY IMPOSED ON A PHYSICIAN BY LAW TO WARN THE PATIENT OF A MEDICAL PROCEDURE'S CONSEQUENCES.

In regard to a medical malpractice action, expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. Birmingham v Vance, 204 Mich App 418; 516 NW2d 95 (1994). One theory of medical malpractice involving a physician's deviation from the standard of care is lack of informed consent. Terhaar v Hoekwater, 182 Mich App 747, 452 NW2d 905 (1990); Halverson v Garrett, unpublished per curiam opinion of the Court of Appeals, decided March 13, 2001, No. 223206. Therefore, claims of negligence based on the failure of a physician to adequately obtain informed consent requires expert testimony. Stampwala v Zamiri, unpublished opinion per curiam of the Court of Appeals, decided June 3, 2003, No. 235329.

See also Paul v Lee, 455 Mich 204; 568 NW2d 510 (1997) where the Michigan Supreme Court held that claims of negligence based on the failure of a physician to adequately obtain informed consent before a procedure or to otherwise fail to instruct or advise a patient come within the general rule regarding the need for expert testimony.

A specific type of claim for lack of informed consent concerns the duty imposed on a physician by law to warn the patient of a medical procedure's consequences. Michigan case law clearly provides that a physician has a duty to warn a patient of the consequences of a medical procedure. Lincoln v Gupta, 142 Mich App 615; 370 NW2d 312 (1984); and Roberts v Young,

369 Mich 133; 119 NW2d 627 (1963).

III. THE COURT OF APPEALS CORRECTLY HELD THAT "MICHIGAN RECOGNIZES AND ADHERES TO THE COMMON-LAW RIGHT TO BE FREE FROM NONCONSENSUAL PHYSICAL INVASIONS AND THE COROLLARY DOCTRINE OF INFORMED CONSENT".

"To be sure, defendants claim that plaintiff Barbara Cornelius was properly informed of the risks and consented to the sclerotherapy treatment". Cornelius v Joseph, (Appendix page 3a) Without question, this statement reveals that the Court of Appeals in rendering its decision, recognized the medical malpractice claim of lack of informed consent concerning the duty imposed on a physician by law to warn the patient of a medical procedure's consequences. In that the "risks" associated with sclerotherapy treatment are at issue as indicated by the Court, this decision by the Court involves a medical malpractice claim, not a claim of battery. See Labarge v Pontiac General Hospital, unpublished opinion per curiam of the Court of Appeals, decided October 7, 1997, No. 184143, where the substance of plaintiff's allegations is that she was not fully informed concerning the potential risks involved in treatment. In its opinion, the Court of Appeals held that this allegation sounds in medical malpractice and not civil battery.

In the instant matter, the Court of Appeals did note that Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the "corollary" doctrine of informed consent, citing In re Rosebush, 195 Mich App 675; 491 NW2d 633 (1992). It is important to understand that the doctrine of informed consent is a natural consequence of the common-law right to be free from nonconsensual physical invasions, or battery. In Michigan, it is undisputed that a physician has a duty to warn a patient of the consequences of a medical procedure. Robins v Katz, 151 Mich App 802; 391 NW2d 495 (1986), citing Lincoln v

Gupta, 142 Mich App 615; 370 NW2d 312 (1985).

As indicated above, in a medical malpractice action, the plaintiff bears the burden of proving the applicable standard of care, breach of the standard by defendant, injury, and proximate causation between the alleged breach and the injury. This standard is also applicable to a claim for lack of informed consent. Halverson v Garrett, No. 223206 (Mich App 3/13/01) citing Locke v Pachtman, 446 Mich 216; 521 NW2d 786 (1994) and Paul v Lee 455 Mich 204; 568 NW2d 510 (1997).

In analyzing a medical malpractice claim for lack of informed consent, it is important to recognize that "malpractice" is a form of negligence utilizing different standard of care than usual "reasonable man". Siirila v Barrios, 58 Mich App 721, 228 NW2d 801 (1975). The term malpractice denotes breach of duty owed by one in rendering professional services to a person who has contracted for such service; in physician malpractice cases, duty owed by physician arises from physician-patient relationship Rogers v Horvath, 65 Mich App 644, 237 NW3f 595 (1975).

Consequently, claims of negligence based on the failure of a physician to adequately obtain informed consent requires expert testimony. Stampwala v Zamiri, unpublished opinion per curiam of the Court of Appeals, decided June 3, 2003, No. 235329, citing Paul v Lee, supra. In Stampwala, plaintiff filed suit against defendants alleging (1) defendants were liable for medical malpractice because Dr, Zamiri failed to obtain plaintiff's "informed consent" and (2) defendants were liable for assault and battery. Prior to trial, plaintiff dismissed the medical malpractice claim, however, attempted to withdraw the dismissal and reinstate the claim. The trial court refused to allow plaintiff to reinstate the medical malpractice claim and the case was tried before a jury. Following the trial, the jury entered a verdict of no cause of action against

plaintiff.

On appeal, plaintiff argued that the trial court abused its discretion in denying her request to reinstate her medical malpractice claim against defendants. In response, defendants argued that because the jury returned a verdict of no cause of action in regard to plaintiff's battery claim, and "battery" is easier to prove than medical malpractice, any error by the trial court in dismissing plaintiff's malpractice claim was harmless. The Court of Appeals disagreed.

In reversing the trial court, and reinstating plaintiff's medical malpractice claim, the Court of Appeals, in its opinion, first acknowledged that "Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent, citing In re Rosebush, 195 Mich Ap 675; 491 NW2d 633 (1992). Explaining further, the Court held that the thrust of plaintiff's malpractice claim is that defendants violated the standard of care by failing to obtain her actual consent. Therefore, in regard to a medical malpractice claim, expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard, citing Birmingham v Vance, supra.

Michigan law is clear that the doctrine of informed consent concerning a physician's duty to obtain inform consent and warn a patient of the "risks" and consequences associated with a medical procedure is a medical malpractice claim involving a standard of care issue requiring expert testimony. Hamilton v Lechner, unpublished opinion per curiam of the Court of Appeals, decided September 17, 1996, No. 169260.

Likewise, in the instant action, the Court of Appeals acknowledged the corollary doctrine of informed consent and recognized that the thrust of plaintiff's malpractice claim is that defendants violated the standard of care by failing to obtain her informed consent as to the risks

associated with sclereotherapy. Therefore, the Court of Appeals correctly utilized the doctrine of informed consent in deciding Plaintiffs' claim of medical malpractice.

IV. A CLAIM OF CIVIL BATTERY AGAINST A PHYSICIAN IS DISTINCTLY DIFFERENT THEN A CLAIM OF FAILURE OF A PHYSICIAN TO ADEQUATELY OBTAIN INFORMED CONSENT.

Pursuant to MCL 600.5805, the statute of limitations is two years for an action charging assault, battery, or false imprisonment. MCL 600.5805(2).

A civil battery, in the context of a claim against a physician, is committed when the physician treats a patient without consent or exceeds the scope of consent. Banks v Wittenberg, 82 Mich App 274, 2766 NW2d 788 (1978). In order to claim a civil battery, there must be a contemporaneous refusal of treatment. Werth v Taylor, 190 Mich App 141, 475 NW2d 426 (1991).

In regard to a medical malpractice action, expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. Birmingham v Vance, 204 Mich App 418; 516 NW2d 95 (1994). Claims of negligence based on the failure of a physician to adequately obtain informed consent require expert testimony. Stampwala v Zamiri, supra.

If a plaintiff alleges that the physician failed to fully inform her concerning her condition and potential risks involved in treatment, this allegation sounds in negligence or medical malpractice and not civil battery. See Labarge v Pontiac General Hospital, unpublished opinion per curiam of the Court of Appeals, decided October 7, 1997, No. 184143, citing Roberts v

Young, 369 Mich 133; 119 NW2d 627 (1963) and Lincoln v Gupta, 142 Mich 615; 370 NW2d 312 (1985).

Therefore, in that a claim of civil battery against a physician is distinctly different then a claim of failure of a physician to adequately obtain informed consent before a procedure or to otherwise fail to instruct or advise a patient which requires expert testimony, both claims may be pursued in a cause of action. See Werth v Taylor, 190 Mich App 141, 475 NW2d 426 (1991).

In the instant matter, Plaintiffs did not plead a claim of battery. The accrual date for a claim of battery occurred on March 13, 1997. Therefore, Plaintiffs had two years from that date to commence an action for battery.

V. THE MICHIGAN SUPREME COURT HAS CONSISTENTLY HELD THAT A PLAINTIFF CANNOT AVOID THE STATUTORY REQUIREMENTS OF PURSUING A MEDICAL MALPRACTICE CLAIM BY LABELING THE CLAIM ORDINARY NEGLIGENCE .

A plaintiff cannot avoid the application of the procedural requirements of a malpractice action by couching the cause of action in terms of ordinary negligence. Gregory v Heritage Hospital, decided sub nom Dorris v Detroit Osteopathic Hosp Corp, 460 Mich 26, 1594 NW2d 455 (1999), citing McLeod v Plymouth Court Nursing Home, 957 F Supp 113 (ED Mich, 1997). In Gregory, plaintiff argued that the claim was an ordinary negligence action and not a medical malpractice action. Therefore, the claim was not subject to MCL 600.2912b or MCL 600.2912d.

In finding that plaintiff Gregory's claim was one of medical malpractice and therefore subject to MCL 600.2912b and MCL 600.2912d, the Supreme Court specifically recognized that the key to a medical malpractice claim is whether it is alleged that the negligence occurred

within the course of a professional relationship. Explaining further, the Supreme Court held that the determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment, citing Wilson v Stilwill, 411 Mich 587; 309 NW2d 898 (1981).

See also Scarsella v Pollak, 461 Mich 547; 607 NW2d 711 (2000), where the Supreme Court discussed its decision of Dorris/ Gregory and that the failure to file the required affidavit of merit stemmed from the fact that plaintiff's attorney did not believe the complaint to be one for medical malpractice. Instead, the complaint in Gregory alleged assault and battery, and was framed as an ordinary negligence claim.

In the instant matter, Plaintiffs have alleged that the negligence occurred within the course of a professional relationship, and that the questions involve medical judgment. Plaintiffs have adhered to the Supreme Court's ruling of Dorris/Gregory, supra, and filed this medical malpractice cause of action in accordance with the procedural requirements of a malpractice action.

VI. PLAINTIFFS DID NOT UTILIZE THE "LAST TREATMENT RULE" IN DETERMINING THE ACCRUAL DATE IN THIS MATTER.

The "last treatment rule", as codified in MCL 600.5838, provided that

> "A claim based on the malpractice of a person who is, or holds himself out to be a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose." (Emphasis added)

For examples of cases involving the last treatment rule, see Shane v Mouw, 116 Mich App 737 (1982), and DeGrazia v Johnson, 105 Mich App 356 (1981) where the Court of Appeals held that a **telephone conversation** between the physician and patient constituted treating or otherwise serving.

In Pendell v Jarka, 156 Mich App 405 (1986), the Court of Appeals specifically recognized that an "occurrence" between office visits may end the doctor-patient relationship. See Bosel v Babcock, 153 Mich App 592 (1986), where the defendant performed surgery twice on the plaintiff's fractured leg, inserting a nail each time to facilitate healing. When the plaintiff fractured his leg again, the physician advised that he could attempt treatment with a third nail or the plaintiff could be transferred to another hospital for treatment by a different physician. The plaintiff chose to transfer. More than two years later, plaintiff filed a malpractice action against **defendant arguing that the statute of limitations had been tolled by a visit he had made within that period to the defendant's office to return certain equipment** related to the defendant's earlier treatment. The Court of Appeals held that **due to the occurrence of the transfer of plaintiff to a different hospital for treatment by a different doctor, the defendant discontinued treating or serving plaintiff on February 26, 1982, and that the parties' ongoing patient-physician relationship ceased and the statute of limitations began to run.**

In Juravle v Ozdagler, 148 Mich App 148 (1985), the defendant performed surgery and provided follow up care to plaintiff. Thereafter, plaintiff consulted another physician, entered a hospital and was treated by a third physician, and consulted with attorneys relative to a possible malpractice action. The **plaintiff then returned to the defendant's office to pick up his medical records. A cause of action was commenced and plaintiff argued that the visit to**

pick up his records constituted "treatment".

See also, Arial v Porretta, 165 Mich App238 (1987) where the Court of Appeals held that the doctor-patient relationship ended and the cause of action accrued when the plaintiff **decided he no longer wanted the defendant to treat him**; and Stapleton v Wyandotte, 177 Mich App 339 (1989) where the Court found that the plaintiff's discharge from the hospital constituted the last treatment where the plaintiff admitted that he did not wish to see the defendants after discharge.

In the instant matter, it is readily apparent that Plaintiffs have not utilized the "last treatment rule" in determining the accrual date. Plaintiffs have not argued that a telephone conversation, a return to defendants' office to retrieve medical records or to return equipment related to Defendants' treatment extended the date the cause of action against Defendants accrued. In fact, March 13, 1997, the date Plaintiff sustained the ulceration to her leg, was not the last date of treatment. Thereafter, Plaintiff returned to Defendants' office for treatment of the ulceration.

VII. THE FACTS OF MCKINEY V CLAYMAN ARE DISTINCTLY DIFFERENT THAN THE FACTS INVOLVED IN THE INSTANT MATTER.

In McKiney v Clayman, 237 Mich App 193 (1998), plaintiff attempted to include **telephone conversations** with defendant which occurred **after** the last treatment date of December 3, 1993, as the accrual dates.

The Court of Appeals specifically held that "defendant's subsequent 1992 and 1993 misdiagnoses and decisions to continue utilizing laser treatment after the spot's recurrences constituted separate acts or omissions that would represent new accrual dates". The Court

found that the alleged acts or omissions supporting plaintiff's malpractice claim against defendant occurred no later than December 3, 1993. Therefore, pursuant to MCL 600.5838a(1), plaintiff's claim accrued by this date.

Applying the Court's decision in McKiney to the instant matter, plaintiff's claim accrued on March 13, 1997, **the date Dr. Joseph performed sclerotherapy on Plaintiff's leg without informed consent of the risks and complications associated with the procedure; and the date the injection caused an ulceration of Plaintiff's leg.**

VIII. THE COURT OF APPEALS IN MCKINEY V CLAYMAN DID NOT ADOPT A "FIRST TREATMENT RULE".

It is imperative to note that the McKiney Court **never** concluded that the accrual date for determining when the statute of limitations begins to run is the date when the diagnosis is made and the course of treatment is begun. Instead, the Michigan Court of Appeals specifically held that "defendant's subsequent 1992 and 1993 misdiagnoses and decisions to continue utilizing laser treatment after the spot's recurrences **constituted separate acts or omissions that would represent new accrual dates".** The Court found that the alleged acts or omissions supporting plaintiff's malpractice claim against defendant occurred no later than December 3, 1993. Therefore, pursuant to MCL 600.5838a(1), plaintiff's claim accrued by this date.

MCL 600.5838a(1) provides in pertinent part as follows:

> "A claim based on medical malpractice accrues at the time of the act or omission that is the basis for the claim of medical malpractice regardless of the time the plaintiff discovers or otherwise has knowledge of the claim."

It should be observed that the McKiney Court determined that December 3, 1993, was the accrual date, even though plaintiff offered no specific date on which the defendant's failures

allegedly occurred. See Flavin v Bean, unpublished opinion per curiam of the Court of Appeals, decided August 12, 2004, No. 247916, where plaintiff alleged that she received counseling from defendant from 1995 through 1998. The Court in Flavin applied the McKiney holding and found that the plaintiff's claim accrued at some point no later than December 31, 1998.

In contrast, in the instant matter, Plaintiffs have offered a specific date; the claim of malpractice alleged by Plaintiffs occurred on March 13, 1997, the date Plaintiff suffered the injury to her leg.

Clearly, it is easy to recognize why the Court of Appeals in McKiney would not adopt a "first treatment rule". For example, if a patient was diagnosed and commenced a course of treatment with a physician in October 1996, and the treatment continued without incident until November 1998, when an **injury** occurred, under Defendants' reasoning, the patient would be barred from pursuing a malpractice action because the claim accrued in October 1996, when the diagnosis and course of treatment began. The two years would have expired in October 1998. Surely, this is not the result Michigan's Legislature intended.

See Mitchell v Policherla, unpublished opinion per curiam of the Court of Appeals, decided May 22, 2003, No. 235578, where the Court held that with allegations of multiple acts or omissions, different accrual dates would be involved. If this were not the case, a healthcare professional could commit an initial act of malpractice and not be held liable for subsequent acts of malpractice in treating the same patient if a lawsuit is not filed within two years of the initial act of malpractice.

Applying the above decisions of the Court of Appeals to the instant matter, Plaintiff's claim accrued on March 13, 1997, **the date Dr. Joseph performed sclerotherapy on Plaintiff's leg without informed consent of the risks and complications associated with the**

procedure; and the date the injection caused an ulceration of Plaintiff's leg.

IX. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ERRED IN RULING THAT PLAINTIFFS' INFORMED CONSENT CLAIM BASED ON THE MARCH 13, 1997, TREATMENT WAS TIME-BARRED.

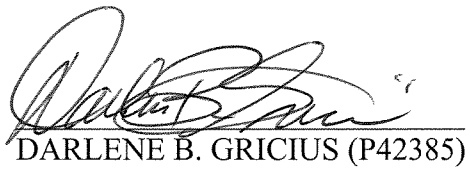
In its decision, the Court of Appeals acknowledged the corollary doctrine of informed consent and recognized that the thrust of plaintiff's malpractice claim is that defendants violated the standard of care by failing to obtain her informed consent as to the risks associated with sclereotherapy. The Court of Appeals utilized the doctrine of informed consent in deciding Plaintiffs' claim of medical malpractice and correctly reasoned that the failure to obtain a patient's informed consent before the initial treatment does not eliminate the need for obtaining the patients' informed consent before subsequent treatments.

Therefore, Plaintiff's claim against Defendants accrued on March13, 1997, the date Defendant performed sclerotherapy on Plaintiff's leg without informed consent of the risks and complications associated with the procedure, and the date the injection caused an ulceration of Plaintiff's leg.

RELIEF REQUESTED

Plaintiffs/Appellees respectfully request that this Honorable Court affirm the decision of the Court of Appeals, and remand this cause of action to the trial court for further proceedings.

Respectfully submitted,



DARLENE B. GRICIUS (P42385)
Attorney For Plaintiffs/Appellees
6230 Orchard Lake Road, Suite 294
West Bloomfield, MI 48322
(248)855-4882

1 of 1 DOCUMENT

KAY L. FLAVIN, Plaintiff-Appellant, v ELLEN S. BEAN, M.S.W., A.C.S.W., Defendant-Appellee.

No. 247916

COURT OF APPEALS OF MICHIGAN

2004 Mich. App. LEXIS 2147

August 12, 2004, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Oakland Circuit Court. LC No. 2001-036288-NH.

DISPOSITION: Affirmed.

JUDGES: Before: Jansen, P.J., and Meter and Cooper, JJ.

OPINION: PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(7) (action barred by statute of limitations). Plaintiff contends that the trial court erred in granting summary disposition to defendant, in denying plaintiff's motion for reconsideration, and in denying plaintiff's request to amend her complaint. n1 We affirm.

n1 This case involves allegations of professional malpractice against defendant, who is a state-licensed social worker. The medical malpractice statute of limitations applies to health care professionals who are licensed or registered under *MCL 333.16101* to *MCL 333.18838*. See *MCL 600.5838a(1)(b)*. *MCL 333.18509* and *MCL 333.18511* provide for the registration of social workers and certified social workers. Therefore, the medical malpractice statute of limitations applies in this action.

[*2]

Whether a cause of action is barred by the statute of limitations is a question of law that this Court reviews de novo. *McKiney v Clayman, 237 Mich. App. 198, 201; 602 N.W.2d 612 (1999)*. Similarly, we review de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). "We consider all documentary evidence submitted by the parties and accept as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence." *Id.* "We view the uncontradicted allegations in the plaintiff's favor and ascertain whether the claim is time-barred as a matter of law." *Id.* This Court reviews a trial court's decision with respect to a motion for reconsideration and a motion to amend pleadings for an abuse of discretion. *Churchman v Rickerson, 240 Mich. App. 223, 233; 611 N.W.2d 333 (2000); Backus v Kauffman (On Reh), 238 Mich. App. 402, 405; 605 N.W.2d 690 (1999)*.

In general, a plaintiff must bring a medical malpractice claim within two years of the act or omission that forms the basis of the claim or within six months after the plaintiff discovers or reasonably **[*3]** should have discovered that she has a claim, whichever is later. *MCL 600.5805(6)*; 600.5838a(2). In the case at hand, the trial court found that plaintiff did not file her claim within two years of the date on which defendant ceased treating plaintiff, a date sometime in October 1998. Plaintiff, on the other hand, contends that she continued to see defendant, albeit not in an office setting,

after this time and that each time there was improper contact between plaintiff and defendant between 1998 and 2000, there was a new "act or omission which is the basis for the claim of medical malpractice."

For acts of malpractice that occurred before October 1, 1986, the claim accrued on the date that the defendant "'discontinued treating or otherwise serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.'" *Solowy v Oakland Hosp Corp, 454 Mich. 214, 219-220; 561 N.W.2d 843 (1997)*, quoting *MCL 600.5838(1)*. However, "on October 1, 1986, an accrual **[*4]** provision specific to medical malpractice claims became effective." *Id.* at 220. This provision provides that medical malpractice claims accrue "at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." *MCL 600.5838a(1)*. The unambiguous language of *MCL 600.5838a(1)* "reflects the Legislature's desire to focus the accrual date of medical malpractice claims on the occasion of the act or omission complained of, and the Legislature's clear rejection of the notion that the existence of a continuing physician-patient relationship by itself could extend the accrual date beyond the specific, allegedly negligent act or omission charged." *McKiney, supra at 203.*

Plaintiff alleges, in both of the complaints that she filed, n2 that she received marital and individual counseling from defendant from 1995 through 1998. Plaintiff does not allege in either complaint any contact between her and defendant after 1998. Accepting plaintiff's well-pleaded allegations as true, *McKiney, supra at 201,* **[*5]** plaintiff's counseling with defendant ended in 1998. Assuming for purposes of our analysis that the act or omission occurred on the last day of 1998, i.e., December 31, 1998, plaintiff's complaint was filed beyond the two-year statute of limitations.

n2 Plaintiff filed a complaint in November 2001 and another in May 2002.

Plaintiff, however, argues that defendant's contacts with plaintiff through November and December of 2000 constituted independent negligent acts or omissions and served as the basis for the accrual date of this claim. This Court has addressed the issue of whether continued treatment of a plaintiff by the defendant can extend the accrual date for medical malpractice claims. In *McKiney, supra at 201,* the plaintiff argued on appeal that because she continued to receive treatment, by way of telephone, from the defendant through March 3, 1994, the March date constituted the accrual date of her malpractice claim and "the trial court therefore erred in relying on the date of plaintiff's **[*6]** last visit to defendant's office as the appropriate accrual date." This Court looked at the plaintiff's complaint, wherein she alleged that the defendant "failed to properly evaluate her condition by not diagnosing her cancer, and failed to properly treat her by neglecting to conduct appropriate examinations . . . ." *Id. at 202.* The Court stated that the plaintiff offered no specific date on which the defendant's failures allegedly occurred, but instead maintained "that these failures represented ongoing deficiencies that continued until the termination date of the parties' physician-patient relationship, March 3, 1994." *Id.* This Court stated that "presumably defendant's diagnosis and treatment decisions initially occurred at some point before his first laser treatment removal in 1990 . . . ." *Id. at 204.*

This Court further stated that it could assume for purposes of its analysis that the defendant's "subsequent 1992 and 1993 misdiagnoses and decisions to continue utilizing laser treatment after the spot's recurrences constituted separate acts or omissions that would represent new accrual dates." *Id.* The Court continued:

> Even assuming **[*7]** further that defendant's December 3, 1993, restatement of his belief that plaintiff did not have cancer qualified as a separate, distinct diagnosis of plaintiff's condition in light of the contrary information she had received from Henry Ford Hospital doctors, plaintiff nowhere alleged any subsequent new act or omission beyond December 3, 1993, that would extend her claim's accrual date. [*Id. at 204-205.*]

Regarding the 1994 telephone conversations, this Court found that the plaintiff's testimony did not allege any new, distinct, negligent acts or omissions by the defendant in the early months of 1994, but indicated that the defendant "merely adhered to his original misdiagnosis and treatment determination." *Id. at 207.* "Because [the] defendant's misdiagnosis and allegedly negligent treatment decisions occurred at some point no later than December 3, 1993, over two years before the plaintiff's filing" of the malpractice claim, this Court concluded that the trial court properly granted the defendant summary disposition under MCR 2.116(C)(7). *Id.*

Like the plaintiff in *McKiney,* who did not allege any new, distinct negligent acts **[*8]** or omissions by the defendant in the early months of 1994, plaintiff's affidavit does not allege any new negligent acts or omissions. Rather, plaintiff states that she and defendant celebrated Christmas together and that they met casually to discuss personal and marital issues that occurred after plaintiff began therapy with a different therapist, Sydney Reiter. n3 Based on the malpractice allegations contained in plaintiff's complaint, defendant's alleged malpractice occurred at some point no later than December 31, 1998. Thus, plaintiff failed to file her claim within the two year period of limitation.

> n3 While plaintiff alleges that she paid over $ 10,000 to defendant for therapeutic services rendered from 1996 to 1998, there is no indication regarding how much of this amount was paid after 1998. Moreover, the affidavit containing the information about payment was filed *after* the court granted summary disposition to defendant.

With regard to the six-month discovery rule, the trial court found that plaintiff's **[*9]** claim remained barred because she did not file the claim within the allowable time period once she was advised by her second therapist of the professional and ethical rules for psychotherapy.

Our Supreme Court stated the following with regard to the six-month discovery rule:

> This Court adopted the "possible cause of action" standard announced in *Moll [v Abbott Laboratories, 444 Mich. 1; 506 N.W.2d 816 (1993)].* The majority concluded that an objective standard applied in determining when a plaintiff should have discovered a claim. Further, the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. *[Solowy, supra at 221-222.]*

"Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id. at 223.* Thus,

> the six-month discovery rule period begins to run in medical malpractice cases **[*10]** when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician. When the cause of the plaintiff's injury is difficult to determine because of a delay in diagnosis, the "possible cause of action" standard should be applied with a substantial degree of flexibility. *[Id. at 232.]*

In the case at hand, defendant argued in support of her motion for summary disposition that Reiter informed plaintiff of the alleged breaches of duty by defendant early on in plaintiff's treatment with Reiter. Defendant cited a report that was prepared by Reiter. In this report, Reiter stated: "Early on it was clear that something was amiss; and I advised this patient about the professional and ethical rules for the provision of psychotherapy, but again her attachment and loyalty [to] Ellen Bean seemed to make her guarded and resistant to this information." Plaintiff contends that her subsequent therapist did not advise her of a potential cause of action against defendant and that even if such information had been given **[*11]** to her, she suffered from a mental condition that precluded her from comprehending those rights she was otherwise bound to know. n4 Plaintiff attached Reiter's affidavit to her response to defendant's motion for summary disposition; in this affidavit, Reiter stated that she did not advise plaintiff that she had a claim against defendant for malpractice. However, the law does not require that the plaintiff know with absolute certainty that the defendant committed malpractice before the six-month period begins to run. *Griffith v Brant, 177 Mich. App. 583, 588; 442 N.W.2d 652 (1989).* Rather, "it merely requires that the plaintiff know of the act and have *reason to believe* that the physician's act was improper." *Id.* (emphasis in original). Based on Reiter's report, plaintiff possessed a level of information that indicated a nexus between her injury and defendant's negligent acts. *Solowy, supra at 226.* We note that Reiter did not give any specific dates in her report. However, even if "early on" in their relationship was interpreted to mean January 2001 (after two years of counseling sessions), the statute of limitations would nonetheless **[*12]** bar plaintiff's claim, because plaintiff did not file her claim until November 16, 2001, after the six-month discovery period. Therefore, the trial court did not err in granting summary disposition to defendant under MCR 2.116(C)(7).

> n4 As discussed *infra,* the evidence in support of this mental condition was submitted after the trial court ruled on the motion for summary disposition.

limitation period. Thus, the trial court did not abuse its discretion in ruling that plaintiff's proposed amendment would have been futile.

Affirmed.

/s/ Kathleen Jansen

/s/ Patrick M. Meter

/s/ Jessica R. Cooper

1 of 1 DOCUMENT

SHOBHA STAMPWALA, Plaintiff-Appellant, v JOSEPH ZAMIRI, M.D., and STERLING PHYSICIANS, P.C., Defendants-Appellees.

No. 235329

COURT OF APPEALS OF MICHIGAN

2003 Mich. App. LEXIS 1332

June 3, 2003, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Oakland Circuit Court. LC No. 98-010900-NH.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

JUDGES: Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

OPINION: PER CURIAM.

Plaintiff appeals as of right from a judgment based on a jury verdict of no cause of action. We affirm in part, reverse in part, and remand.

I. Facts and Procedure

In 1997, plaintiff was diagnosed with having a cancerous growth in her left breast. Plaintiff met with defendant Dr. Joseph Zamiri and discussed performing a lumpectomy to remove the cancerous growth. Plaintiff testified that Dr. Zamiri did not tell her that there was a possibility that she would need a mastectomy, but Dr. Zamiri testified that he did discuss the possibility of a mastectomy with plaintiff. Before her surgery, plaintiff signed a form consenting to a lumpectomy. During the surgery, Dr. Zamiri discovered additional, unexpected cancerous growth in plaintiff's breast. While plaintiff was still under anesthesia in the surgery room, Dr. Zamiri went into the waiting room and **[*2]** told plaintiff's sister, Dharmista Stampwala, and plaintiff's brother-in-law/ex-husband, Suresh Stampwala, that plaintiff needed a mastectomy. Dr. Zamiri told Dharmista and Suresh that plaintiff would eventually need a mastectomy, whether it was during this surgery or at a later date. Dharmista and Suresh agreed to the mastectomy and Dr. Zamiri proceeded to perform the procedure. After the surgery, plaintiff filed suit against defendants, alleging: (1) defendants were liable for medical malpractice because Dr. Zamiri's failure to obtain plaintiff's informed consent before performing the mastectomy violated the standard of care owed to plaintiff and (2) defendants were liable for assault and battery because Dr. Zamiri's performed the mastectomy without plaintiff's consent. During pretrial proceedings, just two days prior to the start of trial, plaintiff voluntarily dismissed the medical malpractice count. Within hours of placing the voluntary dismissal of the medical malpractice claim on the record, plaintiff sought to withdraw the dismissal and reinstate the claim. However, the trial court refused to allow plaintiff to reinstate the medical malpractice claim. A jury trial ensued. Following **[*3]** the trial, a jury entered a verdict of no cause of action against plaintiff.

II. Dismissal of Medical Malpractice Count

Plaintiff first argues that the trial court abused its discretion in denying her request to reinstate her medical malpractice claim against defendants. "This Court reviews for an abuse of discretion a trial court's decision concerning a motion to reinstate an action." *Wickings v Arctic Enterprises, Inc, 244 Mich. App. 125, 138; 624 N.W.2d 197 (2000).* A voluntary dismissal by a plaintiff is without prejudice unless stated in the notice of dismissal. MCR 2.504(1). There is no indication in the present case that the voluntary dismissal was meant to be with prejudice.

In this case, the trial court refused to rule on plaintiff's motion for summary disposition in regard to her battery claim until plaintiff decided whether she was going to voluntarily dismiss her medical malpractice claim. It appears plaintiff voluntarily dismissed her malpractice claim because she believed the trial court

had insinuated that it would be willing to grant summary disposition in her favor on her battery claim if plaintiff dismissed her malpractice claim. n1 **[*4]** After the trial court declined to rule on plaintiff's motion for summary disposition and made several rulings plaintiff perceived to be unfavorable to her battery claim, plaintiff sought to reinstate her malpractice claim. The trial court refused to reinstate plaintiff's medical malpractice claim without giving any reason for its decision other than that plaintiff had voluntarily dismissed it. Because the standard of review is abuse of discretion, we are obligated to affirm the trial court's decision unless an unprejudiced person could say that there was no justification or excuse for the ruling. *Alken-Ziegler, Inc v Waterbury Headquarters Corp, 461 Mich. 219, 228; 600 N.W.2d 638 (1999).* Here, the trial court did not give any justification for its ruling. All of the discovery, including the discovery related to the malpractice claim, had been completed. There is no indication that defendants would have been prejudiced by the reinstatement. In fact, the dismissal of the malpractice claim led to considerable effort by both parties to redact the deposition transcripts to remove any references to the standard of care related to the malpractice claim. Because **[*5]** reinstatement of the malpractice claim would not have prejudiced defendants and the trial court did not give any valid reason for refusing to reinstate the claim, we conclude that the trial court abused its discretion in denying plaintiff's motion to reinstate the claim.

n1 There is no indication that plaintiff filed a written notice or stipulation of dismissal or that the trial court entered a written order of dismissal. See MCR 2.504(A). We recognize that it is not always feasible to file such a notice, stipulation, or order at the same time an oral decision is made to dismiss a case or claim during a hearing. The parties and the court must be given a reasonable amount of time to reduce such an oral stipulation or order to writing. In the meantime, "an oral ruling has the same force and effect as a written order." *McClure v H K Porter Co, Inc, 174 Mich. App. 499, 503; 436 N.W.2d 677 (1988).* Therefore, the parties and the court may rely on the oral stipulation or order until it is practicable to reduce it to writing. Nonetheless, a court speaks through its orders. *Law Offices of Lawrence J Stockler, PC v Rose, 174 Mich. App. 14, 54; 436 N.W.2d 70 (1989).* Accordingly, a written stipulation or order to voluntarily dismiss a claim or case should have been entered within a reasonable time of the oral ruling or decision. No written order was ever entered in this case.

[*6]

Defendants contend that, because the jury returned a verdict of no cause of action in regard to plaintiff's battery claim and battery is easier to prove than medical malpractice, any error by the trial court in dismissing plaintiff's malpractice claim was harmless. We disagree.

"Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent." *In re Rosebush, 195 Mich. App. 675, 680; 491 N.W.2d 633 (1992).* "If a physician treats or operates on a patient without consent, he has committed an assault and battery and may be required to respond in damages. Consent may be express or implied. It has been held that consent is implied where an emergency procedure is required and there is no opportunity to obtain actual consent or where the patient seeks treatment or otherwise manifests a willingness to submit to a particular treatment." *Werth v Taylor, 190 Mich. App. 141, 146; 475 N.W.2d 426 (1991)* (citations omitted). In the present case, the jury was properly instructed that defendants were not liable for battery if plaintiff expressly or impliedly **[*7]** consented to the mastectomy. However, the thrust of plaintiff's malpractice claim is that defendants violated the standard of care by failing to obtain her *actual* consent for the operation. In regard to a medical malpractice claim, expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. *Birmingham v Vance, 204 Mich. App. 418, 421; 516 N.W.2d 95 (1994).* "Claims of negligence based on the failure of a physician or surgeon to adequately obtain informed consent before a procedure or to otherwise fail to instruct or advise a patient come within the general rule regarding the need for expert testimony." *Paul v Lee, 455 Mich. 204, 212; 568 N.W.2d 510 (1997),* overruled on other grounds *Smith v Globe Life Ins Co, 460 Mich. 446, 455-456 n 2, 597 N.W.2d 28 (1999).* In this case, plaintiff's expert witness, Dr. Margaret Dunn, testified in deposition that the standard of care is for a physician to obtain informed consent from a patient in writing before performing a procedure unless the patient is too ill or unfit to consent. n2 Because **[*8]** implied consent is a defense to battery, but expert witness testimony establishes that only actual written consent satisfies the standard of care for physicians in a medical malpractice case, plaintiff's verdict of no cause of action on the battery claim would not necessarily require a similar verdict in regard to her malpractice claim. n3 Therefore, we cannot conclude that the trial court's error was harmless. Although we affirm the no cause of action verdict in regard to plaintiff's battery claim, we remand to the trial court for reinstatement of plaintiff's medical malpractice claim.

n2 Because plaintiff was precluded from reinstating her medical malpractice claim, all

standard of care testimony was redacted from the deposition testimony prior to presenting Dr. Dunn's testimony at trial.

n3 We do not conclude as a matter of law that actual consent is always required in a medical malpractice case. However, Dr. Dunn's testimony in this case was enough to create a question of fact regarding whether actual consent was the appropriate standard of care.

[*9]

III. Admissibility of Testimony Regarding Plaintiff's Former Marriage

Next, plaintiff argues that the trial court abused its discretion in admitting testimony concerning her relationships with Dharmista and Suresh. Plaintiff maintains that the admission of this testimony was irrelevant and unfairly prejudicial. At trial, it was adduced that Dharmista and Suresh were married, but Suresh sought and obtained a divorce. Plaintiff and Suresh were then married. A few months later, plaintiff filed for divorce. Dharmista and Suresh were later remarried. From plaintiff and Suresh's brief marriage, plaintiff's only child was born. Throughout this period, plaintiff, Dharmista, and Suresh lived in the same house.

We review the trial court's decision regarding the admission of evidence for an abuse of discretion. *Hilgendorf v St John Hosp & Medical Ctr Corp, 245 Mich. App. 670, 688; 630 N.W.2d 356 (2001).* Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." MRE 401. Relevant evidence "may be excluded if its probative **[*10]** value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. "Evidence that shows bias or prejudice on the part of a witness is always relevant." *Powell v St John Hosp, 241 Mich. App. 64, 72; 614 N.W.2d 666 (2000).*

We conclude that the trial court did not abuse its discretion in admitting the testimony at issue. This testimony was relevant to Dharmista and Suresh's credibility and their motivations for testifying in plaintiff's favor. The main issue in the case was whether Dr. Zamiri had consent to perform the mastectomy. Because Dharmista and Suresh testified in regard to consent, their credibility was at issue. The contested testimony included Dharmista and Suresh's testimony on cross-examination that plaintiff, Dharmista, Suresh, and their children were a "family unit" and pooled their money. Despite Dharmista and Suresh's admissions that the three combined their assets, they denied having a financial interest in the outcome of the case. Although the testimony regarding the unusual relationship **[*11]** between plaintiff, Dharmista, and Suresh may have been somewhat prejudicial to plaintiff, it was relevant to show their closeness and Dharmista and Suresh's financial motivation for an outcome favorable to plaintiff. Because the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, the trial court did not abuse its discretion in admitting it into evidence.

IV. Consent Instructions

Next, plaintiff takes issue with the trial court's jury instructions on the issue of consent. Plaintiff argues that the trial court erred by instructing the jury that the subsequent conduct of the parties may sometimes be taken into consideration to determine if consent to the intentional touching was given. On appeal, we generally review de novo claims of instructional error. *Case v Consumers Power Co, 463 Mich. 1, 6; 615 N.W.2d 17 (2000).* However, we review the trial court's determination whether an instruction is accurate and applicable to the case for an abuse of discretion. *Stevens v Veenstra, 226 Mich. App. 441, 443; 573 N.W.2d 341 (1997).* "There is no error requiring reversal if the theories **[*12]** and applicable law were adequately and fairly presented to the jury." *Id.*

First, plaintiff argues that the trial court's subsequent conduct instruction was erroneous as a matter of law. The trial court instructed the jury as follows:

Sometimes subsequent conduct of the parties can also be taken into consideration to determine if originally there was a meeting of the minds to give consent to the willful and intentional touching. Implied consent requires a meeting of the minds or mutual agreement and does not exist unless the minds of the parties meet by reason of words or conduct.

Plaintiff argues that the jury may only consider a patient's conduct subsequent to a surgical procedure to determine whether the patient gave consent for *another, later* surgical procedure. Plaintiff contends that subsequent conduct may not be considered to determine consent to a procedure that has already occurred. Plaintiff is correct in stating that, in *Banks v Wittenberg, 82 Mich. App. 274, 280; 266 N.W.2d 788 (1978),* this Court determined that it was proper for the trial court to instruct the jury that it could consider the plaintiff's conduct after his first surgical **[*13]** procedure in order to determine whether he gave implied consent to a second procedure. *Banks* does not stand for the proposition that a jury may be instructed that a patient's conduct after a procedure may be considered to determine whether he consented to the procedure. Conversely, *Banks* does not preclude consideration of subsequent acts to determine whether the patient consented to the initial procedure. Plaintiff

does not cite any law stating that a jury may not be instructed to consider evidence of subsequent conduct when determining consent to an intentional touching. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v Taylor, 457 Mich. 232, 243; 577 N.W.2d 100 (1998)*, quoting *Mitcham v Detroit, 355 Mich. 182, 203; 94 N.W.2d 388 (1959)*. Plaintiff has not shown that the trial court erred in giving the jury instruction at issue.

Plaintiff also argues that the trial **[*14]** court's consent instruction was erroneous because its use of the term "in other words" minimized the preceding instruction. n4 However, plaintiff failed to preserve this issue for appeal by specific objection. Therefore, we review this issue for plain error. *Shinholster v Annapolis Hosp, 255 Mich. App. 339, 350; 660 N.W.2d 361 (2003)*, lv pending (Supreme Court Docket No. 123720). To obtain relief, plaintiff must demonstrate a clear or obvious error that affected the outcome of the case. *Id.* Plaintiff has failed to give any reason why the trial court's use of this phrase was plain error that affected the outcome of the case. Therefore, plaintiff's argument fails.

n4 The instruction at issue read as follows:

> Generally, implied consent is where the intention is not manifested by direct or explicit words between the parties, but is to be gathered by the implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction.
>
> *In other words*, implied consent is one which arises under circumstances which, according to the ordinary course of dealing and common understanding of persons, show a mutual intention to agree. [Emphasis added.]

[*15]

V. Plaintiff's Motion for JNOV or New Trial

Plaintiff next asserts that the trial court erred in denying her motion for a new trial. Plaintiff argues that the trial court should have granted her a new trial for several reasons. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Bynum v The ESAB Group, Inc, 467 Mich. 280, 283; 651 N.W.2d 383 (2002)*. First, plaintiff argues that an irregularity in the proceedings occurred when the trial court refused to allow plaintiff to reinstate her medical malpractice claim and redacted all standard of care references from Dr. Dunn's testimony, while leaving standard of care testimony from defendants' expert. A new trial may be granted whenever a party's substantial rights are materially affected and there was an "irregularity in the proceedings of the court, jury or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial." MCR 2.611(A)(1)(a). A new trial my also be granted when a party's substantial rights are materially affected and an error occurred in the proceedings. MCR 2.611(A)(1)(g). As discussed, *supra*, the **[*16]** trial court abused its discretion in denying plaintiff's request to reinstate her malpractice claim. Therefore, plaintiff is entitled to a trial on this claim. However, the trial court's abuse of discretion in refusing to reinstate the malpractice claim does not entitle plaintiff to a new trial on the battery claim. The redacted testimony at issue related to the standard of care and was only applicable to the dismissed medical malpractice claim. Furthermore, plaintiff does not argue which testimony was erroneously redacted from the depositions or why her battery claim was prejudiced by these redactions. Therefore, although the trial court abused its discretion in disallowing plaintiff from trying her malpractice claim, we cannot conclude that the trial court abused its discretion in denying plaintiff's motion for a new trial on her battery claim on this basis.

Second, plaintiff argues that the trial court abused its discretion in denying her motion for a new trial on the battery claim because the jury verdict of no cause of action was against the great weight of the evidence. A court may grant a new trial whenever a party's substantial rights are materially affected and a verdict **[*17]** is against the great weight of the evidence or contrary to law. MCR 2.611(A)(1)(e).

When a party claims that a jury's verdict was against the great weight of the evidence, we may overturn that verdict "only when it was manifestly against the clear weight of the evidence." This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. [*Ellsworth v Hotel Corp of America, 236 Mich. App. 185, 194; 600 N.W.2d 129 (1999)* (citations omitted).]

In support of her argument, plaintiff asserts that that there was no credible evidence that plaintiff consented to the mastectomy. However, Dr. Zamiri testified that he "vividly" recalled discussing the possibility of a mastectomy with plaintiff and that plaintiff consented to the surgery.

The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the **[*18]** record reveals a miscarriage of justice.

[*Id.* (citations omitted).]

Credibility of the witnesses was a major issue in this case and the jury apparently believed Dr. Zamiri and concluded that plaintiff had consented to the mastectomy. We refuse to substitute our judgment of credibility for that of the jury and conclude that a review of the record does not reveal a miscarriage of justice. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on great weight of the evidence grounds.

Plaintiff also argues that the trial court erred in denying her motion for judgment notwithstanding the verdict (JNOV). However, plaintiff's argument in this regard is conclusory and plaintiff does not give any reason why the trial court abused its discretion in denying her motion for JNOV. n5 "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Green Oak Twp v Munzel, 255 Mich. App. 235, 244;* ___ N.W.2d ___ (2003). "An appellant's failure to properly address the merits of his assertion of error constitutes an abandonment of the issue." *Id.*

n5 In support of her position that the trial court erred in denying her motion for a new trial, plaintiff merely argues as follows: "Plaintiff submits that the Court committed an error of law by failing to grant its pretrial and limine motion granting Plaintiff judgment as a matter of law on the issue of battery."

[*19]

VI. Admissibility of Testimony of Dr. Telmos

Next, plaintiff argues that the trial court abused its discretion in admitting the testimony of defendants' expert witness, Dr. Allen Telmos. "We review a trial court's decision regarding the admissibility of expert witness testimony for an abuse of discretion." *In re Wentworth, 251 Mich. App. 560, 562-563; 651 N.W.2d 773 (2002).* Plaintiff argues that Dr. Telmos' testimony was inconsistent with the foundational facts of the case and that his opinions were contrary to Michigan law.

This Court has held that an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts. *Green v Jerome-Duncan Ford, Inc, 195 Mich. App. 493, 499; 491 N.W.2d 243 (1992); Thornhill v Detroit, 142 Mich. App. 656, 658; 369 N.W.2d 871 (1985).* This is true where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation. *Green, supra at 500.*

[*20] [*Badalamenti v William Beaumont Hosp-Troy, 237 Mich. App. 278, 286; 602 N.W.2d 854 (1999).]*

First, plaintiff argues that Dr. Telmos' testimony was inadmissible because he "changed the facts" when he referred to the surgery as "cancer" surgery, rather than a lumpectomy. The rationale in *Badalamenti* is not applicable to this testimony. Dr. Telmos testified that he understood that plaintiff wanted to be cured of cancer and that Dr. Zamiri had discussed the possibility of a mastectomy with her. This testimony is not inconsistent with witness testimony that plaintiff saw Dr. Zamiri for treatment of a cancerous growth in her breast or Dr. Zamiri's testimony that he discussed the possibility of a mastectomy with plaintiff and that she agreed to the surgery.

Plaintiff also argues that Dr. Telmos' testimony that Dr. Zamiri obtained consent to perform the mastectomy from plaintiff's family was inconsistent with the testimony of the witnesses. On the contrary, the testimony at trial showed that Dharmista and Suresh consented to the mastectomy. Plaintiff further argues that Dr. Telmos' testimony that Dr. Zamiri had implied consent to cure plaintiff was inconsistent **[*21]** with the testimony of the witnesses. Dr. Telmos appeared to base this conclusion on Dr. Zamiri's testimony that he discussed the possibility of a mastectomy with plaintiff before the surgery. Therefore, Dr. Telmos' opinion does not rely on any erroneous foundational facts and the reasoning in *Badalamenti* does not apply.

Finally, plaintiff argues that Dr. Telmos' testimony that a surgeon can obtain consent to perform non-emergency surgery from a patient's family was contrary to Michigan law. n6 However, Dr. Telmos did not testify as plaintiff suggests. Dr. Telmos testified that a patient must consent to surgery before it can be performed. He testified that it would have been wrong for Dr. Zamiri to perform the mastectomy without plaintiff's prior consent, and that plaintiff had given Dr. Zamiri this consent at a pre-operative meeting. He testified that a surgeon had implied consent to cure a patient's disease where the patient's life was at risk, but acknowledged that plaintiff's life was not at risk during the operation at issue. The *Badalamenti* reasoning does not apply to this testimony and plaintiff fails to explain why this testimony was otherwise inadmissible. Moreover, **[*22]** the trial court instructed the jury that consent could only be found by actual or implied consent given by plaintiff. The jury is presumed to have followed the instructions. *Bordeaux v The Celotex Corp, 203 Mich. App. 158, 164; 511 N.W.2d 899 (1993).* Therefore, plaintiff's argument lacks merit. Because Dr. Telmos' testimony was not inconsistent with the foundational facts or contrary to law, the trial court did not abuse its discretion in admitting Dr. Telmos' testimony.

n6 Surgery that goes beyond the scope of the patient's consent and is not necessary to preserve the patient's life may constitute assault and battery. *Franklyn v Peabody, 249 Mich. 363, 367-368; 228 NW 681 (1930); Werth, supra at 146.*

VII. Admissibility of Consent Testimony

Next, plaintiff argues that the trial court abused its discretion in admitting Dr. Zamiri and Dr. Tara Shah's testimony that they talked to Dharmista and Suresh during the surgery and obtained **[*23]** their consent to perform the mastectomy. Plaintiff argues that this testimony was inadmissible because it was contrary to Michigan law that surgery that goes beyond the scope of the patient's consent and is not necessary to preserve the patient's life may constitute assault and battery. *Franklyn v Peabody, 249 Mich. 363, 367-368; 228 NW 681 (1930); Werth, supra at 146.* We disagree. Neither Dr. Zamiri nor Dr. Shah testified that the only consent needed or given to perform the mastectomy was from Dharmista and Suresh. Dr. Shah testified that Dr. Zamiri talked to Dharmista and Suresh about the mastectomy merely as a matter of courtesy. Dr. Zamiri testified that he believed that he already had plaintiff's consent to perform the mastectomy. Furthermore, plaintiff does not explain why this evidence would be inadmissible under the *Badalamenti* rationale even if Dr. Zamiri and Dr. Shah had testified that they believed that they were only required to obtain plaintiff's family's consent before performing the mastectomy. Moreover, as discussed, *supra*, the trial court instructed the jury that consent could only be found by actual or implied **[*24]** consent given by plaintiff.

VIII. Admissibility of Testimony of Dr. Kolins

Plaintiff also argues that the trial court abused its discretion in allowing defendants' expert pathologist, Dr. Mark Kolins, to testify at trial. Plaintiff contends that the trial court abused its discretion in allowing Dr. Kolins to testify because he was not listed as a witness in the final pretrial order. "The decision whether to allow a party to add an expert witness is within the discretion of the trial court." *Tisbury v Armstrong, 194 Mich. App. 19, 20; 486 N.W.2d 51 (1991).* Although Dr. Kolins was not listed in the final pretrial order, he was listed in a timely-filed witness list. Therefore, plaintiff was on notice during discovery that defendants might call Dr. Kolins as a witness. Plaintiff argues that she changed her trial strategy because she did not think that Dr. Kolins was going to testify, but plaintiff does not argue how she changed her trial strategy or how this change in trial strategy prejudiced her. Furthermore, plaintiff does not discuss any of Dr. Kolins' testimony or explain how his testimony adversely prejudiced her. Therefore, we cannot say that the **[*25]** trial court abused its discretion in allowing Dr. Kolins to testify at trial.

IX. Juror Challenge

Next, plaintiff asserts that the trial court erred in failing to excuse a potential juror for cause when the potential juror had been a patient of Dr. Zamiri in the 1960's. "The decision to grant or deny a challenge for cause is within the sound discretion of the trial court." *Poet v Traverse City Osteopathic Hosp, 433 Mich. 228, 236; 445 N.W.2d 115 (1989).* Plaintiff takes issue with the trial court's decision to excuse the juror for cause, presumably n7 under MCR 2.511(d)(3), which provides that a juror may be challenged for cause on the grounds that he is biased for or against a party or attorney.

n7 The extent of plaintiff's argument is a conclusory sentence that reversal is warranted pursuant to MCR 2.511 and *Poet, supra.*

In *Poet, supra at 241,* the Supreme Court held that in order for a party to establish that the trial court abused its discretion **[*26]** in refusing to grant a party's challenge of a juror for cause, there must be some clear and independent showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable.

Here, plaintiff used a peremptory challenge to excuse the juror at issue and did not demonstrate a desire to excuse another subsequently summoned juror. Therefore, she was not prejudiced by the trial court's denial of her challenge for cause and reversal is not required.

X. Award of Costs

Finally, plaintiff argues that the trial court erred in allowing defendant costs for depositions that were not filed with the clerk. Costs are generally allowed to the prevailing party in an action. MCR 2.625(A)(1). Given our remand of this action for reinstatement of plaintiff's medical malpractice, the prevailing party is yet to be determined. Therefore, we vacate the award of costs as premature. n8

n8 We note that on remand, *MCL 600.2549* provides for the award of deposition costs:

Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the

trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

"Under the plain language of the statute, [a] trial court errs in taxing the costs of those depositions that have not been filed in a court clerk's office." *Elia v Hazen, 242 Mich. App. 374, 381; 619 N.W.2d 1 (2000).*

[*27]

XI. Conclusion

In sum, we affirm the trial court's treatment of plaintiff's battery claim, but reverse the trial court's denial of plaintiff's motion to reinstate her medical malpractice claim and remand for further proceedings regarding that claim. Additionally, we vacate the trial court's award of costs.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra

*2003 Mich. App. LEXIS 1247, **

SHERYL **MITCHELL,** Plaintiff-Appellant, v HARANATH **POLICHERLA,** M.D., P.C., d/b/a POINTE MEDICAL CENTER, POINTE MEDICAL CENTER, P.C., and THULASHI DIVI, M.D., Defendants-Appellees.

Nos. 237578; 238217

COURT OF APPEALS OF MICHIGAN

2003 Mich. App. LEXIS 1247

May 22, 2003, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Wayne Circuit Court. LC Nos. 00-002058-NH; 01-110867-NH.

DISPOSITION: Affirmed.

CORE TERMS: medical malpractice, statute of limitations, malpractice, visiting, affidavit of merit, failure to produce, omission, alteration, appellate review, two-year, failure to file, time-barred, summarily, lawsuit, constitutional argument, cause of action, predicated, accrued, cause of action accrued, effectively waived, applicable statute, equal protection, de novo, continuing-treatment, continuing-wrong, authorization, inadequately, mammography, timebarred, six-month

JUDGES: Before: Cooper, P.J., and Sawyer and Murphy, JJ.

OPINION: PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right from multiple judgments granting defendants' motions for summary disposition. Two separate lawsuits were filed below by plaintiff, both arising out of the alleged medical malpractice of defendants for failure to timely diagnose and properly treat plaintiff relative to a lesion in plaintiff's left breast that was ultimately diagnosed as being highly suggestive of malignancy. Both suits were summarily dismissed. n1 We affirm in part, and reverse and remand in part.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 For purposes of this opinion, the lawsuit filed on January 21, 2000, will be referred to as the "first action," and the suit filed on March 30, 2001, shall be referenced as the "second action."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*2]**

After thoroughly reviewing and unraveling the proceedings in the trial court, we come to the following conclusions. Plaintiff's claims predicated on the failure to produce medical records

and alteration of medical records were summarily dismissed in the first action on the basis that there is no recognizable cause of action under either theory. Additionally, with respect to failure to produce records, the claim was dismissed because only "access" to records is required under MCL 600.2912b(5), and because plaintiff initially failed to sign an authorization to release records. Therefore, it can be said that both those claims were effectively dismissed for failure to state a cause of action, MCR 2.116(C)(8), and further, in regard to the failure to produce claim, for there being no genuine issue of material fact, MCR 2.116(C)(10).

Plaintiff's medical malpractice claim was summarily dismissed in the first action because the statute of limitations had expired, MCR 2.116(C)(7). n2 With respect to the statute of limitations, the trial court incorporated defendants' arguments in support of its rulings, and those arguments focused on the date plaintiff's malpractice **[*3]** claim accrued. n3 Concerning the second action predicated solely on medical malpractice, the trial court also dismissed the action based on expiration of the statute of limitations. Additionally, the second action was dismissed on the basis of prior judgment or res judicata, MCR 2.116(C)(7), and MCR 2.116(C)(6). n4 With these conclusions in mind, we now address the parties' appellate arguments.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 We reach this particular conclusion because in settling the order on the visiting judge's ruling from the bench in the first action (dismissal without prejudice for failure to file an affidavit of merit), the trial court entered an order dismissing the medical malpractice claim finding that it was time-barred. The trial court did not expressly reverse or vacate the visiting judge's ruling.

Rather, the trial court, in effect, found the visiting judge's ruling to be irrelevant in light of the bar under the statute of limitations. In finding that plaintiff's malpractice action was timebarred, the trial court's order dismissing the action created a dismissal with prejudice; therefore, it would not have been proper to incorporate the visiting judge's ruling that dismissal was without prejudice. Remembering that a court speaks through its written judgments and orders, *Tiedman v Tiedman*, 400 Mich. 571, 576; 255 N.W.2d 632 (1977), because the visiting judge's ruling had not been finalized by the entry of an order, the trial court had the authority to consider additional arguments in support of dismissing the first action prior to the entry of the order dismissing the action. See MCR 2.602(A)(1)(all judgments and orders must be in writing). **[*4]**

n3 Defendants also argued below that plaintiff failed to file suit within six months of discovering her cause of action. See *infra* footnote 6.

n4 MCR 2.116(C)(6) provides for dismissal where "another action has been initiated between the same parties involving the same claim."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Plaintiff asserts error associated with the visiting judge's ruling, the statute of limitations ruling with respect to both actions, and the rulings dismissing the claims for failure to produce medical records and alteration of medical records. Additionally, plaintiff maintains that MCL 600.2912b and MCL 600.2912d are unconstitutional as violative of due process and equal protection. Because we find that plaintiff's appellate arguments, except those regarding

the statute of limitations and the visiting judge's ruling, are inadequately briefed, our focus is narrowed considerably. Moreover, any discussion related to the second action is unnecessary. If the medical malpractice claim in the first action was properly dismissed pursuant to the statute of limitations, **[*5]** the second action was also necessarily time-barred, where the allegations of malpractice were identical. n5 If the first action was improperly dismissed, the second action cannot proceed in light of MCR 2.116(C)(6), which directs dismissal of a second lawsuit where two actions are pending regarding the same parties and same claims. See *Ross v Onyx Oil & Gas Corp,* 128 Mich. App. 660, 666; 341 N.W.2d 783 (1983). We recognize that this reasoning does not look at the trial court's ruling in the second action from the perspective that at the time, the first action was being dismissed with prejudice by the court. In that sense, prior judgment-res judicata clearly barred the second action. MCR 2.116(C)(7); *Sewell v Clean Cut Mgt, Inc,* 463 Mich. 569, 575; 621 N.W.2d 222 (2001). Our point is merely that the second action, and the rulings thereon, have become irrelevant.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 We hold infra that if dismissal of the first action was premised in any part on failure to file an affidavit of merit, it was improper.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*6]**

Regarding plaintiff's constitutional argument, there is no citation of any authority and no meaningful discussion of how the medical malpractice statutes particularly violate due process and equal protection principles. The argument is devoid of any minimal analysis and explanation. As our Supreme Court stated in *Mudge v Macomb Co,* 458 Mich. 87, 105; 580 N.W.2d 845 (1998), quoting *Mitcham v Detroit,* 355 Mich. 182, 203; 94 N.W.2d 388 (1959):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."

Therefore, we shall not address plaintiff's constitutional argument.

Regarding plaintiff's argument that the trial court erred in dismissing the claim for failure to produce medical records, plaintiff, once again, fails to cite any authority and fails to address, challenge, **[*7]** or distinguish the authority relied on by the trial court below in dismissing the action. Moreover, plaintiff fails to address in any manner the language in MCL 600.2912b (5) pertaining to "access" rights and the issue of timely authorization; both of which formed the basis of the trial court's ruling. Thus, plaintiff has effectively waived any appellate review. *Mudge, supra* at 105.

Regarding plaintiff's argument that the trial court erred in dismissing the claim premised on alteration of medical records, it is inadequate because it fails to address and distinguish, in any meaningful manner, the authority relied on by the trial court in support of its ruling, nor does the argument provide any meaningful discussion on or support for the proposition that Michigan has recognized, or should recognize, an independent cause of action for alteration of medical records. A single citation to an Ohio case without any discussion is insufficient.

Thus, plaintiff has effectively waived any appellate review of this issue. *Mudge, supra* at 105.

Plaintiff argues that the visiting judge erred in summarily dismissing the first action with **[*8]** respect to the medical malpractice claim, where an amended complaint had been filed along with an affidavit of merit before the judge's ruling from the bench. Rulings on motions for summary disposition are reviewed de novo by this Court. *Spiek v Dep't of Transportation,* 456 Mich. 331, 337; 572 N.W.2d 201 (1998). We agree that in light of the fact that an amended complaint and affidavit of merit had been filed, as permitted by the trial court, the visiting judge erred in ruling from the bench that summary disposition was appropriate based on failure to file an affidavit of merit with the original complaint. The visiting judge, in essence, dismissed the original complaint which was no longer of any relevance. To the extent that the trial court's order dismissing the first action incorporated by implication in any manner the visiting judge's oral ruling from the bench, it was error.

This leaves only the issue whether the first action for medical malpractice was timebarred . If no facts are in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a cause of action is barred by the applicable statute of limitations **[*9]** is a question of law for the trial court, which we review de novo. *Jackson Co Hog Producers v Consumers Power Co,* 234 Mich. App. 72, 77; 592 N.W.2d 112 (1999). Generally, the statute of limitations in a medical malpractice action is two years from the act or omission that forms the basis of the claim or within six months after the plaintiff discovers or reasonably should have discovered the potential claim. MCL 600.5805(5); MCL 600.5838a(1) and (2). Here, plaintiff only cites the two-year statute of limitations found in MCL 600.5805(5) in support of her position. n6

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 Were we to consider the six-month discovery provision found in MCL 600.5838a(2), it would not benefit plaintiff. The mammogram that indicated a malignancy was performed in April 1999, which would be the time that plaintiff knew or should have known of a possible cause of action. Even tolling the statute of limitations during the 182-day notice period pursuant to MCL 600.5856(d), the filing of the amended complaint and affidavit of merit on October 11, 2000, was well beyond the six-month discovery period.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*10]**

We agree with plaintiff that the statute of limitations ceased running at the time the amended complaint and affidavit of merit were filed, which was on October 11, 2000. MCL 600.2912d (1); *Scarsella v Pollak,* 461 Mich. 547; 607 N.W.2d 711 (2000). n7 Plaintiff fails to raise any issue of possible tolling during the statutory notice period under the provisions of MCL 600.5856(d); therefore, we shall not address that statute. Plaintiff does argue that the limitation period was equitably tolled from September 10, 1999 (notice of intent) to March 27, 2000 (copies of records released) because of defendants' alleged withholding of plaintiff's medical records. Plaintiff fails to adequately brief the issue of equitable tolling, *Mudge, supra* at 105, and we note that plaintiff made no attempt to request time extensions pursuant to MCL 600.2912d(2) and (3). The record does not reveal plaintiff's entitlement to equitable principles. Therefore, plaintiff's action for medical malpractice needs to have accrued within the two-year period prior to October 11, 2000, in order **[*11]** to survive summary disposition.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 In *Scarsella, supra* at 551-552, our Supreme Court stated that "a plaintiff who files a

medical-malpractice complaint without the required affidavit is subject to dismissal without prejudice, and can refile properly at a later date. However, such a plaintiff still must comply with the applicable period of limitation." The filing of a complaint without an affidavit of merit is ineffective and does not toll the applicable statute of limitations. *Id.* at 553.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Plaintiff's amended complaint identified numerous instances of alleged malpractice some of which occurred through April 1999, which date is within the two-year limitation window. In particular, plaintiff alleged failure to perform a spot compression prior to April 1999 and failure to refer to a surgeon prior to April 1999. Additionally, without reference to dates, there are general allegations of failure to properly monitor the progression of plaintiff's condition, failure to properly diagnose **[*12]** plaintiff's condition, and failure to properly treat plaintiff's condition.

Defendants' position below, which was adopted by reference by the trial court, was that plaintiff's cause of action accrued in December 1996 when a mammography was allegedly first discussed with plaintiff. Plaintiff's and her husband's affidavits indicated that a mammography was never recommended in 1996. Of course the affidavits thus suggest that a claim for malpractice accrued in 1996; however, defendants and the trial court failed to recognize that there were subsequent independent instances of alleged malpractice aside from those related to doctor visits in late 1996. This is not a case where plaintiff saw defendants only in 1996 without any subsequent involvement by defendants in plaintiffs' medical care. If such were the case, we would agree that a cause of action accrued solely in 1996, and that would be the only date to consider. MCL 600.5838a(1) specifically provides that an action for medical malpractice "accrues at the time of the act or omission that is the basis for the claim of medical malpractice . . . ." Accordingly, with allegations of multiple acts or omissions, **[*13]** different accrual dates would be involved. If this were not the case, a healthcare professional could commit an initial act of malpractice and not be held liable for subsequent acts of malpractice in treating the same patient if a lawsuit is not filed within two years of the initial act of malpractice. n8

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 We wish to make clear that we are not suggesting that plaintiff can proceed under a continuing-wrong or continuing-treatment theory of accrual. This Court has rejected any continuing-wrong or continuing-treatment rule in the context of time-bar analysis in a medical malpractice action for purposes of determining an accrual date. *McKiney v Clayman*, 237 Mich. App. 198, 208; 602 N.W.2d 612 (1999).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In terms of acts and omissions that occurred before the two-year period running up through October 11, 2000, plaintiff is time-barred from pursuing a claim for medical malpractice. Because defendants' motions for summary disposition focused on the initial alleged act of malpractice in **[*14]** 1996, plaintiff was not obligated or required to present documentary evidence to create an issue of fact with regard to later acts or omissions of alleged malpractice. MCR 2.116(G). As such, it was error for the trial court to dismiss plaintiff's entire medical malpractice action on the basis of the statute of limitations.

In conclusion, we cannot say that the trial court erred in dismissing claims predicated on failure to produce medical records and alteration of medical records, where plaintiff has inadequately briefed the issues for appellate review. Additionally, appellate review of

plaintiff's constitutional argument is waived for failure to submit an adequate brief. Next, there was no basis to dismiss plaintiff's medical malpractice claim in the first action for failure to file an affidavit of merit, where one was filed with an amended complaint before the hearing to dismiss was held. Regarding the medical malpractice claim in the second action, it cannot survive in light of our ruling that the first action is to remain open. MCR 2.116(C)(6). Finally, with regard to the statute of limitations and the medical malpractice claim in the first action, the claim was improperly dismissed **[*15]** in its entirety because plaintiff alleged some negligent acts or omissions that were not time-barred.

Affirmed in part, and reversed and remanded in part. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ David H. Sawyer

/s/ William B. Murphy

STATE OF MICHIGAN
IN THE SUPREME COURT

BARBARA CORNELIUS and
GERALD CORNELIUS,

Plaintiffs/Appellees,

vs.

K.M. JOSEPH, M.D., BLUE WATER VASCULAR CLINIC, and ST. JOHN HEALTH SYSTEM,

Defendants/Appellants.

Supreme Court No. 123765
COA#: 237956
Lower Ct. #. 99-002403-NH

Hon. Daniel J. Kelly

DARLENE B. GRICIUS (P42385)
Attorney for Plaintiffs/Appellees
6250 Orchard Lake Road, Suite 294
West Bloomfield, MI 48322
(248) 855-4882

MERIA E. LARSON (P30582)
FRANK J. LAGROU (P48877)
BLAKE, KIRCHNER, SYMONDS,
LARSON, KENNEDY & SMITH, P.C.
Attornyes for Defendants/Appellants
1432 Buhl Building, 535 Griswold
Detroit, MI 48226
(313) 961-7321

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

DARLENE B. GRICIUS, being first duly sworn, deposes and says that on September 1, 2004, she personally served two (2) copies of Plaintiffs/Appellees' Brief on Appeal upon Meria E. Larson, 1432 Buhl Building, 535 Griswold, Detroit, MI 48226. by having same enclosed in an envelope with postage fully prepaid and deposited in a United States postal receptacle.

DARLENE B. GRICIUS

Subscribed and sworn to before me on
this 1st day of September 2004
Dawn M Rybinski
Notary Public
Oakland County, Michigan
My Commission Expires: 9/21/2007